Office - Supreme Court, U.S.
FILED
AUG 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 341

PETER DI PALERMO,

Petitioner

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE J. TODARO
Counsel for Petitioner
Office and P. O. Address
135 Broadway
New York 6, N. Y.

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	11
APPENDIX A (Opinion)	12
APPENDIX B (Judgment)	14

AUTHORITIES CITED

Cases

Hill v. United States, 275 F. 187	7, 8, 10
Morissette v. U. S., 342 U. S. 246	8, 10
U. S. v. Balinet, 258 U. S. 250	10
U. S. v. Behrman, 258 U. S. 280	10
United States v. Carll, 105 U. S. 611	5, 7, 8, 10

Statutes

Title 18, U.S.C.A. §265	7
Title 18, U.S.C. §472	2
Title 28 U.S.C. §1254	1
Title 28, U.S.C. §2255	2, 4

IN THE

Supreme Court of the United States

October Term, 1957

No.

PETER DE PALERMO,

Petitioner

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The per curiam opinion of the Court of Appeals (App. A) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 5, 1957 (App. B). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Question Presented

Whether the District Court Judge and the United States Circuit Court of Appeals properly overruled a United States Supreme Court decision that has been the foundation and the basis of our criminal law. The decision holds that an indictment for violating a statute of the common law crime of uttering a counterfeit bank note, fails to charge a crime against the United States unless the indictment alleges scienter or guilty knowledge on the part of the defendant. In this case it is petitioner's contention that count one of the indictment for which he was convicted and received a sentence of fifteen years, was void because that count of the indictment failed to allege that the *defendant knew* the money in question was in fact counterfeit.

Statutes Involved

Title 18, Section 472, United States Code reads as follows:

> "§ 472. *Uttering counterfeit obligations or securities.*
>
> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Title 28, Section 2255, United States Code reads as follows:

§ 2255. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Statement

An appeal was taken from an order made in the United States District Court for the Southern District of New York, denying a motion made by the defendant, Peter Di Palermo, to vacate judgment of conviction and sentence pursuant to Title 28, United States Code, Section 2255 (R* fols. 19-21). Indictment C 129-338 was returned May 6, 1949. The first count of C 129-338, which is the sole count of the indictment in question on this motion, is as follows (R fol. 1):

"The Grand Jury charges:

"1. That on or about the 28th day of April, 1949, in the Southern District of New York, JOSEPH FARINA, PETER DIPALERMO and DANIEL SPERDUTTO, the defendants, with intent to defraud, did keep in their possession and conceal, certain falsely made forged and counterfeited

* "R" refers to the appendix filed by petitioner in the Court below

> obligations and securities of the United States, to wit, 500 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $10 each; and 250 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $20 each (Title 18, Section 472, U. S. Code)."

On November 22, 1949, defendant, Di Palermo, was sentenced on this count of the indictment to a term of fifteen years. He was sentenced to a term of ten years on Count Two of the indictment, which charged him with the sale of this counterfeit money. He was sentenced to a term of five years on Count Three of the indictment, which charged him with conspiring with other co-defendants to possess and sell this counterfeit money. The sentences imposed by Hon. Sylvester J. Ryan, United States District Judge were to run concurrently (R fol. 7).

Reasons for Granting the Writ

I

The first count of the indictment in question failed to charge the defendant with any crime against the United States because the indictment failed to allege that the defendant knew of the counterfeit character of the money he was charged with having possessed.

The authority for the defendant's contention that count one of the indictment is fatally defective is the case of the *United States* v. *Carll*, 105 U. S. 611.

Carll was indicted under Section 5431, revised Statute, with having "feloniously, and with intent to defraud the

bank of the metroplis . . ., did pass, utter, and publish upon and to the said bank of the metroplis, a falsely made, forged, and counterfeited obligation and security of the United States" (Which was set forth according to its tenor), against the peace, and contrary to the form of the Statute.

The Statute then prohibiting the offense is quoted by the Court as follows:

> "Every person who, with intent to defraud, passes, utters, publishes or sells any falsely made, forged, counterfeited or altered obligation or other security of the United States shall be punished by a fine of not more than $5,000, and by imprisonment at hard labor not more than fifteen years."

Carll brought the same question that is raised here by Di Palermo: did omission of the allegation that he knew the counterfeit character of the obligation fail to charge him with a crime? Answering this question the Court stated as follows at page 612:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offenses intended to be punished, and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."
>
> * * * * *
>
> "The language of the Statute on which this indictment is founded includes the case of every person

> who with intent to defraud u[illegible] any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, *with* intent to defraud, of an instrument in fact counterfeit but supposed by the defendant to be genuine, though within the words of the Statute, would not be within its meaning and object.
>
> This indictment, by omitting the allegation . . . that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to *charge him with any crime*. The omission is of *matter of substance*, and *not a defect or imperfection* in matter of form only." (Italics ours.)

* * * * * *

While it is true that the law of the *Carll* case involved only the offense of uttering, indicative of its far reaching effect is that forty years later, the 7th Circuit Court of Appeals in *Hill* v. *United States*, 275 F. 187, unhesitatingly and sternly extended it to include the companion offense of "possession," and this even though the Statute had since been revised (18 U. S. C. A. 205).

Delivering the opinion of the Court, Judge Evans said:

> "Plaintiff in error was convicted on . . . an indictment . . . with having in his possession a falsely altered and spurious bank note. The . . . Count is challenged because no violation of any Statute is disclosed. We think the exception well taken. Nowhere in this Count is it alleged that plaintiff in error knew that the bank note in his possession was altered

or spurious. *This was a fatal omission.* U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

The count of the indictment here under consideration is not as full or complete as the one condemned in the Carll Case.

"Neither in the government's brief nor on the oral argument do we find a serious attempt to justify or excuse the absence of this necessary allegation."

It will be seen, therefore, that in the *Carll* case the Court referring to the indictment under attack, used the words that the indictment "fails to charge him with any crime. The omission is a matter of substance." While in the *Hill* case, which is directly in point, the Court used the language, referring to the indictment—"this was a fatal omission." The language of both clearly indicates that the failure to charge knowledge or scienter renders the indictment fatally defective or fails to charge a crime against the United States.

If that be the Law, then had the defendant Di Palermo pleaded guilty to that count of the indictment, his plea was to a crime unknown to the United States and therefore void.

An interesting case which gives the history of the common law and the subsequent codification of the common law, and which reiterates in substance the doctrines enunciated in *U. S. v. Carll* and *Hill v. United States, supra*, is the case of *Morissette v. U. S.*, 342 U. S. 246, decided in 1952, Justice Jackson, in writing the opinion, stated as follows, at page 252:

"As the states codified the common law of crimes, even if their enactment were silent on the subject,

(referring to scienter and intent) their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definition of the requisite but elusive mental element . . .

However, the Balint (U. S. v. Balint, 258 U. S. 250) and Behrman (U. S. v. Behrman, 258 U. S. 280) offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend on no mental element but consist only of forbidden acts or omissions."

At page 260:

"The conclusions reached in the Balint and Behrman cases has our approval and adherence for the circumstances to which it was there applied."

At page 269:

"If one crime without intent has been smuggled into a section whose dominant offenses do require intent, it was put in ill fitting and compromising company. The government apparently did not believe that conversion stood so alone when it drew this one count indictment to charge that Morissette 'did unlawfully, wilfully and knowingly steal and convert to his own use' . . ."

Justice Jackson in footnote sub. 30 refers to *U. S. v. Carll*, with obvious approval of its doctrine.

This learned treatise by Justice Jackson gives an historical review of the codification of the Common Law by our various States as well as by Acts of Congress. It also recognizes the change brought about in the law where an act prohibited by statute could be prosecuted without proof of scienter, knowledge or intent. This was brought about by reason of the changing times and by reason of the industrial revolution.

The cases of *U. S. v. Balint* and *U. S. v. Behrman*, *supra*, fall in these categories.

In the case at bar, it has been shown by the authorities above cited, that the indictment in question was fatally defective and did not charge a crime.

It is significant to observe, however, that the opinion of the District Court and the per curiam opinion of the United States Circuit Court of Appeals, are singularly silent and noncommital with respect to the cases urged by this petitioner. The *Carll* case, the *Hill* case and the *Morrissette* case, *supra*, are treated with deep and significant silence.

It thus follows that if the doctrine laid down in the *United States v. Carll* and *Hill v. United States*, *supra*, is still the law of the United States—that count one of the indictment is fatally defective and failed to charge the defendant with a crime against the United States—and the motion to dismiss that count should have been granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE J. TODARO
Counsel for Petitioner
Office and P. O. Address
135 Broadway
New York 6, N. Y.

August, 1957.

APPENDIX A

(OPINION)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 392—October Term, 1956.

(Argued June 13, 1957 Decided July 5, 1957.)

Docket No. 24622

PETER DIPALERMO,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

CLARK, *Chief Judge*, and
CHASE and HINCKS, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*.

Peter DiPalermo appeals from a judgment denying his latest motion under 28 U. S. C. §2255 to vacate for claimed technical defects in the indictment his sentence under the conviction affirmed in *United States* v. *Farina et al.*, 2 Cir., 184 F. 2d 18, certiorari denied *Farina* v. *United States*, 340 U. S. 875, rehearing denied, 341 U. S. 928, rehearing denied *United States* v. *Farina*, 2 Cir., 193 F. 2d 436, see

also *United States* v. *DiPalermo*, 2 Cir., 228 F. 2d 901, certiorari denied *DiPalermo* v. *United States*, 351 U. S. 912.

GEORGE J. TODARO, New York City, *for petitioner-appellant.*

ALAN W. RICHENAKER, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for respondent-appellee.*

PER CURIAM:

Judgment affirmed. *Auron* v. *United States*, 4 Cir., 188 F. 2d 446, certiorari denied 341 U. S. 954; *Barnes* v. *United States*, 8 Cir., 197 F. 2d 271.

APPENDIX B

(JUDGMENT)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of July one thousand nine hundred and fifty-seven

Present:

HON. CHARLES E. CLARK
Chief Judge

HON. HARRIS B. CHASE
HON. CARROL C. HINCKS
Circuit Judges

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

PETER DIPALERMO
Defendant-Appellant

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk